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Public Policy Exception in Judicial Review of Arbitration Awards [Iowa Electric Light and Power Company v. Local Union 204, International Brotherhood of Electrical Workers, 834 F.2d 1424 (8th Cir. 1987)]

James P. Moran

PUBLIC POLICY EXCEPTION IN JUDICIAL REVIEW OF ARBITRATION AWARDS

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INTRODUCTION

Since the United States Supreme Court rulings in the *Steelworkers* Trilogy[1] nearly thirty years ago, a strong national policy favoring the arbitration of labor disputes has emerged.[2] In the Trilogy, the Court defined the nature of the collective bargaining agreement and the arbitrator's role in interpreting it.[3] In the first case, *United Steelworkers of America v. American Manufacturing Co.*, the Court ruled that a court may not determine the merits of a grievance when the parties have agreed to submit the grievance to arbitration.[4] In the second Trilogy case, *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, the Court ruled that there is a presumption of arbitrability in any collective bargaining agreement that has an arbitration clause.[5] While the first two Trilogy cases dealt with enforcement of an agreement to arbitrate, the third, *United Steelworkers of America v. Enterprise*

1. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

2. *See generally* ELKOURI & ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985); Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 MO. L. REV. 243 (1987); W. GOULD, A PRIMER ON AMERICAN LABOR LAW 136 (2d ed. 1986); Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267 (1980); Nolan & Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557 (1983); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977).

3. *See supra* note 1.

4. 363 U.S. at 568–69. The Court indicated that it is not necessarily the merit of the particular grievance that makes the arbitration process successful and a viable alternative to the courts, but the fact that the parties negotiated an agreement to have all disputes handled by an arbitrator and that they can rely on this process for an efficient and fair resolution of their grievance. "Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." *Id.* at 567.

5. 363 U.S. at 583–85. The Court stated that "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582–83.

Wheel & Car Corp., involved judicial review of an arbitration award.[6] The Court in *Enterprise Wheel* refused to review the merits of the arbitration award as long as the arbitrator's ruling was related to the collective bargaining agreement.[7] The only requirement for enforcement of an order was that the arbitrator's decision draw "its essence from the collective bargaining agreement."[8]

Although the *Steelworkers* Trilogy recognized arbitration as an effective and preferable alternative to litigation, the lower courts have had a difficult time applying the "essence of the contract" standard of review. Some of the circuit courts have shown great deference to the fact-finding and analysis of the labor arbitrator, while others claiming to follow the same analysis are more willing to intervene and review the merits of an arbitration award.[9] Part of the problem is that since the formulation of the "essence" standard, the Supreme Court has given little guidance as to what standards the lower courts should use to determine whether the arbitrator has stayed within the limits of the contract.[10] In using the "essence" standard, "[c]ourts have not hesitated to ignore arbitral awards dealing with issues such as employment discrimination, constitutional protections, or statu-

6. 363 U.S. 593 (1960).

7. *Id.* at 599.

8. *Id.* at 597. If the arbitrator's decision does not "draw its essence from the contract" then the court may vacate it because it was not what the parties had bargained for—an interpretation of the collective bargaining agreement. However, "A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *Id.* at 598. In addition, the Court ruled that the interpretation of the agreement is a question for the arbitrator, and the courts have no business overruling his interpretation merely because their interpretation is different from his. *Id.* at 599.

9. *See also* Ray, *Court Review of Labor Arbitration Awards Under the Federal Arbitration Act*, 32 VILL. L. REV. 57, 59–60 (1987). *Compare* Morgan Serv., Inc. v. Local 323, Chicago & Central States Joint Bd., 724 F.2d 1217, 1222–24 (6th Cir. 1984) (overturning arbitrator's award of reinstatement without back pay) *and* Sears, Roebuck & Co. v. Teamsters Local Union No. 243, 683 F.2d 154, 156 (6th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983)(to find an implied condition, arbitrator must first find language of contract to be ambiguous), *with* Ethyl Corp. v. United Steelworkers of America, 768 F.2d 180, (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986). In *Ethyl*, the court noted that judicial review of arbitration awards is limited to determination of whether the award "can be rationally derived from some plausible theory of the general framework or intent of the agreement." *Id.* at 186 (quoting Desert Palace, Inc., v. Local Joint Executive Bd., 679 F.2d 789, 793 (9th Cir. 1982) (citations omitted)). *See also* Drummond Coal Co. v. UMW District 20, 748 F.2d 1495, 1498 (llth Cir. 1984)(award upheld because "at least rationally inferable" from collective bargaining agreement and intent of parties).

10. Kaden, *supra* note 2, at 267–68. "In the absence of adequate guidance, the lower courts have had difficulty in formulating and applying standards to determine whether an arbitrator has respected the limits of the authority granted him by the collective bargaining agreement." *Id.*

tory rights."[11]

It has been where the grievance is intertwined with "external"[12] law that the courts have had the most difficulty in determining whether the arbitrator's award is drawn from the essence of the contract. The Supreme Court attempted to clarify the issue in *Enterprise Wheel* by ruling that the arbitrator may look to many sources to interpret the collective bargaining agreement. The Court gave its usual admonition, however, that the award must draw its essence from the contract.[13]

The Court again addressed this issue in *Alexander v. Gardner-Denver Co.*,[14] stating that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties."[15] The Court further stated that the arbitrator's "task is to effectuate the intent of the parties rather than the requirements of enacted legislation."[16] However, the Court in *Gardner-Denver* addressed the issue of the arbitrator's obligations when the public law is not incorporated into the collective bargaining agreement. The Court did not address the standard of review appropriate for the courts when the agreement incorporates external law into the agreement or when the parties specifically ask the arbitrator to rule upon the applicability of external law to the grievance.[17] In addition, the ruling in

11. Heinsz, *supra* note 2, at 244 (footnote omitted). *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)(Court refused to preclude employee who was ruled against in arbitration from pursuing claim in Federal Court under Title VII of the Civil Rights Act of 1964); Professional Admrs. Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639 (6th Cir. 1987) (arbitration award allowing unilateral increase of contributions to pension and welfare fund held unenforceable as contrary to public policy). *But see* W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber Workers, 461 U.S. 757 (1983) (court may not second guess arbitrator's interpretation of collective bargaining agreement).

12. External Law refers generally to constitutional, statutory and case law rules. The arbitrator may face a conflict between applying the terms of the collective bargaining agreement or the external law when there is a conflict between the two. He faces the problem of possibly being overturned by the courts if he ignores the external law and rules only on the private law agreed upon between the parties in the collective bargaining agreement. On the other hand, if he attempts to reconcile the external law with the agreement, he faces the risk that he may have overstepped his function as an arbitrator and failed to draw his conclusions from the essence of the contract. *See generally* ELKOURI & ELKOURI, *supra* note 2, at 373–74.

13. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

14. 415 U.S. 36 (1974).

15. *Id.* at 53.

16. *Id.* at 56–57. *Gardner-Denver* specifically dealt with a conflict between the seniority provisions in a collective bargaining agreement and the rights created by Title VII of the Civil Rights Act of 1964. The Court reasoned that a ruling adverse to the employee under the nondiscrimination clause of the agreement did not preclude his statutory right to pursue his rights under Title VII. *Id.* at 54.

17. *See generally* Heinsz, *supra* note 2, at 260.

Gardner-Denver related to a situation where there was a specific statutory provision that clearly applied to the employee's circumstances, but was not considered in the collective bargaining agreement. A more difficult situation arises, however, when there is no specific statute which clearly applies to the grievance. It is in these cases, where some general, poorly defined "public policy" seems to have been violated by an award, that the courts have had the most trouble.

Some courts have resolved this issue by vacating the arbitrator's award on the basis that it conflicts with public policy and is therefore unenforceable.[18] The rationale behind vacating the award is that allowing such an award would place unreviewable power in the hands of an arbitrator in an area that does not merely affect the private parties, but also affects the general public.[19] It is clear that when an arbitrator's decision is contrary to a specific statute or other manifestation of public law it is consequently against public policy. However, it is not equally clear that an award is contrary to "public policy" when it is not in conflict with something so definite as a statute.

The question then becomes, absent a positive manifestation of the law, what standards and guidelines should a court use to determine public policy and whether it conflicts with the arbitrator's award? This Comment will attempt to explore this question in the context of a recent Eighth Circuit case, *Iowa Electric Light and Power Company v. Local Union 204 of the International Brotherhood of Electrical Workers*,[20] and in light of the criteria set out by the United States Supreme Court,[21] in its earlier cases as well as its most recent decision in this

18. *See, e.g.*, Professional Adm'rs Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639 (6th Cir. 1987) (wages and benefits must be collectively bargained pursuant to the Labor Management Relations Act); S.D. Warren Co. v. United Paperworkers Int'l Union, 815 F.2d 178 (lst Cir. 1987), *vacated*, 108 S. Ct. 497 (1987) (award reinstating employees who had been discharged for possession of marijuana on employer's premises unenforceable as a matter of public policy); Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739 (5th Cir. 1985), *rev'd*, 108 S. Ct. 364 (1987) (award contrary to public policy against operation of dangerous machinery by persons under the influence of drugs or alcohol); United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822, 825 (lst Cir. 1984) ("it violates public policy to force the Postal Service to reinstate an employee who was recently convicted of directly violating his fiduciary duties through the embezzlement of a large sum of money"); Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983) (award ordering reinstatement of truckdriver-employee caught drinking liquor on duty violated public policy and should not therefore be enforced).

19. *Cf.* American Postal Workers Union v. United States Postal Serv., 682 F.2d 1280 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983) (award reinstating postal employee who mistakenly participated in nonunion strike held unenforceable pursuant to federal statute prohibiting individual who participated in strike against government from holding government position).

20. 834 F.2d 1424 (8th Cir. 1987).

21. *See supra* note 1 and accompanying text.

area, *United Paperworkers International Union v. Misco, Inc.*[22] In addition, this Comment will explore how the Supreme Court's criteria are being applied by the federal courts of appeals and more specifically how they are being applied in the Eighth Circuit. Finally, this Comment will engage in a critical analysis of the court's reasoning in *Iowa Electric* to determine if it is actually applying the standards of the Supreme Court and also explore possible alternatives or interpretations of the current criteria.

I. THE UNITED STATES SUPREME COURT AND THE PUBLIC POLICY EXCEPTION

Recognizing the difficulty the circuit courts have had in applying the Trilogy standards to review of arbitration decisions, one commentator has proposed that the Supreme Court is at least partly to blame for not further clarifying these standards:

> The *Steelworkers* opinions made an important, even historic start, but they should have been followed after a time by further efforts to elaborate a theory of national labor policy applicable to collective bargaining agreements. Inevitably, a Court thus engaged would have found both need and opportunity to clarify the reasoned justification for the finality principle, and thus to identify a meaningful standard for judicial review of arbitration awards. Yet, in the past two decades, the Court has not returned to the subject. If the mission launched by *Lincoln Mills* and *Steelworkers* has floundered in the circuits, the Court must share some of the blame.[23]

In *W.R. Grace & Co. v. Local 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*,[24] the Supreme Court engaged in a long awaited attempt to clarify the standards enunciated in the *Steelworkers Trilogy*. In *W.R. Grace*, the employer faced possible liability for violations of Title VII of the Civil Rights Act of 1964. Rather than risk this liability he chose to sign a conciliation agreement with the Equal Employment Opportunity Commis-

22. 108 S. Ct. 364 (1987).

23. Kaden, *supra* note 2, at 277 (footnote omitted). The citations of the omitted footnote are listed below. The cases are ones which the Court has turned down for review. *See, e.g.*, Holodnak v. Avco Corp., 423 U.S. 892 (1975), *denying cert. to* 514 F.2d 285 (2d Cir), *rev'g in part* 381 F. Supp. 191 (D. Conn.); Satterwhite v. United Parcel Serv., Inc., 419 U.S. 1079 (1974)(Douglas, J., dissenting), *denying cert. to* 496 F.2d 448 (10th Cir.); Modern Air Transport, Inc. v. Machinists Dist. No. 145, 419 U.S. 1050 (1974), *denying cert. to* 495 F.2d 1241 (5th Cir); United States Gypsum Co. v. United Steel Workers, 419 U.S. 998 (1974), *denying cert. to* 492 F.2d 713 (5th Cir.); Otis Elevator Co. v. Local 453, Int'l. Union of Electrical Workers, 373 U.S. 949 (1963), *denying cert. to* 314 F.2d 25 (2d Cir.); Local 520, ILGWU v. Glendale Mfg. Co., 366 U.S. 950 (1961) (Douglas, J., dissenting), *denying cert. to* 283 F.2d 936 (4th Cir. 1960).

24. 461 U.S. 757 (1983).

sion (EEOC).[25] The union was invited to participate in formulating this agreement, but refused. As part of the agreement the employer agreed to conduct layoffs according to the conciliation agreement which conflicted with the seniority provisions of the collective bargaining agreement. As a result, the men who were laid off in violation of the collective bargaining agreement filed a grievance against the employer. The employer refused to go to arbitration and an injunction was issued by the district court to enjoin the arbitration of the grievance.[26] This was reversed by the court of appeals and the employer was compelled to go to arbitration.[27]

The arbitrator subsequently found for the union and awarded backpay damages to the employees.[28] The employer appealed the arbitrator's award on the grounds that it violated public policy both because it required him to violate Title VII and also because to avoid the backpay damages he would have been required to violate a court injunction.[29] The United States Supreme Court ruled that a court may refuse to enforce, as with any contract, a collective bargaining agreement that is contrary to public policy.[30] The Court stated, however, that such a public policy "must be well-defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' "[31] The Court further noted that "the question of public policy is ultimately one for resolution by the courts."[32]

The Court agreed with the district court that obedience to judicial orders is most certainly an important public policy.[33] However, it also stated that enforcement of the collective bargaining agreement as interpreted by the arbitrator did not compromise that public policy.[34] In effect, the Court held that the employer could not hide behind the public policy exception because it had created its own dilemma. "The Company committed itself voluntarily to two conflicting contractual obligations."[35] The question ultimately became one of who was to bear the burden of the company's dilemma—the

25. *Id.* at 759.
26. *Id.* at 760.
27. *Id.* at 762.
28. *Id.* at 762–64.
29. *Id.* at 764–66.
30. *Id.* at 766. *See also* Hurd v. Hodge, 334 U.S. 24, 34–35 (1948).
31. *W.R. Grace*, 461 U.S. at 766. This statement apparently refers to a situation in which an arbitrator decides the importance of a "public policy" in his decision and not to situations in which the legislature has determined public policy.
32. *Id.* (citation omitted).
33. *Id.*
34. *Id.* at 767.
35. *Id.* The company's dilemma was that if it ignored the collective bargaining agreement and followed the conciliation agreement, it faced liability for breach of contract. However, if it followed the collective bargaining agreement and ignored

company or the union? The Arbitrator, in interpreting the collective bargaining agreement, decided that the company should bear the losses caused by its decision to follow the erroneous district court decision.[36] The Court ruled that the company voluntarily assumed obligations under the collective bargaining agreement to abide by the arbitrator's interpretation of that agreement. Finally, the Court stated, "No public policy [was] violated by holding the company to those obligations which bar the company's attempted reallocation of the burden."[37]

In a footnote the Court noted that compensatory damages may be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy.[38] The Court further stated that this would be particularly applicable in this case since the union had "no responsibility for the events giving rise to the injunction, and entered into the collective-bargaining agreement ignorant of any illegality. . . ."[39] This language is significant because it makes it clear that when the employer is aware of the obligations of the collective bargaining agreement, and then makes a decision that puts the agreement in conflict with public policy, it will be responsible for incurring the losses associated with the conflict.

The second important public policy noted in *W.R. Grace* relates to obtaining voluntary compliance with Title VII. Congress intended that conciliation and cooperation be used to enforce Title VII. The Court ruled that, although the company and EEOC agreed in this case to nullify the collective bargaining agreement's seniority provisions, this agreement was not valid because it failed to include the union in the conciliation process.[40]

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the district court's injunction which mandated that it lay off employees according to the conciliation agreement, it faced both a contempt citation and Title VII liability.

36. *Id.* The Court noted, however, that nothing in the arbitrator's award required the company to violate the district court's order. The arbitrator's award neither mandated layoffs nor required that they be conducted according to the collective bargaining agreement. "The award simply held, retrospectively, that the employees were entitled to damages for the prior breach of the seniority provisions." *Id.* at 768–69.

37. *Id.* at 770.

38. *Id.* at 769 n.13 (citing RESTATEMENT (SECOND) OF CONTRACTS § 365, comment a (1981)).

39. *W.R. Grace*, 461 U.S. at 769 n.13.

40. *Id.* at 771. Although the Court held that there was not a public policy conflict on this issue, that holding was based on the fact that the agreement was a voluntary one between the company and the EEOC. The opinion did not specifically discuss the issue of mandatory compliance. However, the court stated: "Absent a judicial determination, the Commission, not to mention the company, cannot alter the collective-bargaining agreement without the Union's consent." *Id.* (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (Commission's power to investigate and conciliate does not have coercive legal effect)).

The significance of the holding in *W.R. Grace*, to at least one commentator, was that "it left no uncertainty as to the use of public policy as a gauge to determine the propriety of an arbiter's decision."[41] Unfortunately, despite the restrictive language applied, many courts have used *W.R. Grace* as an effective way to avoid procedural restrictions placed on them by the Supreme Court.[42] The courts' burden in reviewing arbitration cases is to measure the award "not only against the norm of the collective agreement but also against notions of public law. . . ."[43] However, it is also clear from the Court's ruling that mere recitation of a public policy consideration is not enough to sustain a public policy exception. In addition, a party cannot use the public policy exception to avoid liability if its own actions placed it in conflict with its obligations under the collective bargaining agreement.[44]

In *United Paperworkers International Union v. Misco, Inc.*,[45] the Supreme Court once again attempted to clarify the criteria necessary for judicial review of arbitration awards that pose a possible conflict with a public policy consideration. In *Misco*, the Court of Appeals for the Fifth Circuit overturned an arbitrator's award because the award violated the important public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."[46]

The employee in *Misco* was apprehended in the employer's parking lot in the back seat of a car, from which two fellow employees had just left, with a lighted marijuana cigarette in the front seat ashtray. A search of the employee's car, elsewhere on the lot, revealed a plastic scales case containing marijuana residue. However, the employer was not aware of this search until shortly before arbitration. The employee was subsequently discharged for violating the em-

41. Heinsz, *supra* note 2, at 261.

42. *Id.* at 261–62. *See also supra* note 18.

43. Heinsz, *supra* note 2, at 263. According to Heinsz, in laying out his "Enterprise Plus" standard, the court is not only required to determine whether the award complies with the Enterprise Wheel standard (whether the award "draws its essence from the contract"), but must also measure the award against public policy considerations. Heinsz sees basically three instances where public policy and the "Enterprise Plus" standard becomes involved in the arbitration process:

(1) an arbitrator, *sua sponte*, utilizes public law as a basis for an award;
(2) the arbitrator renders a decision on a contractual issue which one of the parties claims conflicts with some legal rights; or
(3) the parties, as a part of their submission agreement, request the arbitrator to decide a contractual issue based on public policy principles.

Id.

44. *W.R. Grace*, 461 U.S. at 767.

45. 108 S. Ct. 364 (1987).

46. Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739, 743 (1985), *rev'd*, 108 S. Ct. 364 (1987).

ployer's rule against possession or use of drugs or alcohol on its premises.[47] The employee filed a grievance which subsequently went to arbitration where the arbitrator ruled that there was no violation of the drug rule and reinstated the employee with full back pay and seniority.[48]

On appeal, the United States Supreme Court again reaffirmed the rule from *Enterprise Wheel*: the courts may play only a limited role when asked to review the decision of an arbitrator.[49] The courts may not review the merits of an award even if it rests upon factual error or misinterpretation of the collective bargaining agreement.[50] In addition, the Court stated that "where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect."[51] The Court reasoned that if intervention was allowed on such grounds, the quick resolution of grievances under collective bargaining agreements would be undermined.[52]

However, once again the Court confirmed that a court may refuse to enforce a contract that violates law or public policy.[53] The opinion did reiterate, however, that a court's refusal to enforce an arbitrator's decision is necessarily restricted to situations where the contractual interpretation would violate some explicit public policy that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general consider-

47. *Id.* at 741. The employer's plant at which the employee worked had experienced a significant drug and drinking problem especially on the night shift of which the employee was a member. In addition, he had been reprimanded twice for shoddy, inattentive work. The employee operated a machine called the slitter-rewinder which cuts rolling coils of paper by means of sharp blades. *Id.* at 740.

48. *Id.* at 741. This award was overturned by the district court whose decision was appealed by the Union. The court of appeals upheld the district court's decision. *Id.* at 743.

49. *Misco*, 108 S. Ct. at 370.

50. *Id.*

51. *Id.* at 371. The Court stated, "Normally, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct." *Id.* at 372. The opinion then went on to note the example in *Enterprise Wheel* where the arbitrator reduced the discipline from discharge to a 10-day suspension. The arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*" *Id.* at 372 (emphasis in original) (quoting Enterprise Wheel, 363 U.S. 593, 597 (1960)).

52. *Id.* at 371.

53. *Id.* at 373. The Court further noted:

> [The] doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.

Id.

ations of supposed public interests.' "[54]

The Court found that public policy was not violated in this case because the award did not create any "explicit conflict" with other laws and legal precedents.[55] In addition, the Court noted that the court of appeals had made no attempt to review existing law and legal precedents to ascertain that they established a "well defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs.[56] However, the Court found that, even if the court of appeals' formulation of public policy was accepted, no violation of that policy had occurred.[57] It was inappropriate for the court of appeals to draw the inference from the lighted cigarette that the employee was actually under the influence of the drug. Similarly, the court of appeals also made an assumption about the employee's "amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration award."[58] Specifically, the Supreme Court stated:

> Had the arbitrator found that [the employee] had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that [the employee] could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.[59]

The Supreme Court did find, however, that it was unnecessary to address the union's argument that a court can only refuse to enforce an award on public policy grounds when the award itself violates a statute, regulation, or other manifestation of positive law or compels conduct by the employer that would violate such a law.[60] Although the Court did not accept the union's argument, it also made it clear that merely meeting the *W.R. Grace* requirements may not be enough. Instead, the *W.R. Grace* requirements are to be construed as a minimum threshold. "At the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced."[61] The added requirement seems to be that

54. *Id.* at 373 (quoting *W.R. Grace*, 461 U.S. at 766).

55. *Id.* The Court stated that two points followed from their decision in *W.R. Grace*: "First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy." *Id.*

56. *Id.* at 374.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 374–75 n.12. This understanding was reiterated by Justice Brennan in his concurrence. *Id.* at 375.

61. *Id.* at 373–74. The standards set out by the Court in this case require that the

there must be an "explicit conflict" between the arbitration award and the public policy consideration.[62]

Thus, in *Misco*, in addition to finding that the court of appeals' characterization of public policy was based simply on general considerations, the Court also found that even if the arbitrator had found that the employee had possessed drugs and then imposed a discipline short of discharge, his award could not be upset by the court of appeals. This seems to be the case because there was not necessarily any "explicit" conflict with the public policy. Safety in the workplace was not necessarily undermined because the employee was not discharged. What makes a conflict "explicit" seems to be predicated not on the requirement that an award be illegal, but that upholding the award would make upholding public policy impossible.

An example of this is *Alexander v. Gardner-Denver Co.*,[63] in which the Supreme Court ruled that in certain circumstances an action *de novo* may be maintained despite an adverse arbitration award.[64] The Court reasoned that an action *de novo* may be commenced under the public policy exception because denying such an action would have made it impossible for the employee to assert his statutorily mandated right to bring suit under Title VII.[65] Thus, in *Gardner-Denver*, prohibiting review of the award and public policy did not merely conflict, but made upholding the public policy impossible. Consequently, the requirement is not that the award must be contrary to a statute, positive law, or mandate illegal conduct. Neither is it that the award merely be in possible conflict with a clearly defined public policy. The award, rather, must be in "explicit conflict" with a clearly defined public policy.

II. The Public Policy Exception in the Federal Courts of Appeals

The courts of appeals and the district courts have generally professed to follow the standards laid out by the Supreme Court in *En-*

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public policy be "well defined and dominant" and ascertained "by reference to laws and legal precedents. . . ." *Id.* (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)). Justice Brennan particularly supported this view in his concurrence:

> I do not understand the Court, by criticizing the company's public policy formulation, to suggest that proper framing of an alleged public policy under the approach set out in *W.R. Grace* would be sufficient to justify a court's refusal to enforce an arbitration award on public policy grounds. Rather, I understand the Court to hold that such compliance is merely a necessary step if an award is not to be enforced.

Id. at 376.

62. *Id.* at 373.

63. 415 U.S. 36 (1974).

64. *Id.* at 60. *See also supra* notes 14–16.

65. 415 U.S. at 54–55.

terprise Wheel. In fact, many courts have continued to review the merits of awards by citing the public policy exception.[66] While many of the courts have met the minimum requirement set out in *W.R. Grace*, i.e., that the public policy be clearly defined and not merely a "general consideration of public policy," they have often failed to take the next step and adequately demonstrate that these considerations put the award in explicit conflict with public policy.

For instance, in *United States Postal Service v. American Postal Workers*,[67] the arbitrator had ordered the reinstatement, without back pay, of a postal employee who had been convicted of embezzling postal funds.[68] The Court of Appeals for the First Circuit overturned the award, ruling that the reinstatement of the employee violated an important public policy against the embezzlement of government money.[69] In addition to citing statutes that pertain to the conduct and honesty of postal employees, the court addressed the effect that reinstatement would have on other postal employees and on the public in general:

> Other postal employees may feel there is less reason for them to be honest than they believed—the Union could always fix it if they were caught. Moreover, the public trust in the Postal Service, and in the entire federal government, could be diminished by the idea that graft is condoned.[70]

While it is not apparent that these are "clear and defined" state-

66. *See, e.g.,* Professional Admrs. Ltd. v. Kopper-Glo Fuel, Inc., 819 F.2d 639, 643 (6th Cir. 1987) ("an arbitration award contrary to the public policy is unenforceable"); S.D. Warren Co. v. United Paperworkers' Int'l Union, 815 F.2d 178, 186 (1st Cir. 1987), *vacated,* 108 S. Ct. 497 (1987) (award vacated because "there is a well-defined public policy against the use of drugs in the workplace"); Local One Amalgamated Lithographers of America v. Stearns & Beale, Inc., 812 F.2d 763, 769 (2d Cir. 1987) (when public policy "well defined and dominant," award unenforceable); Misco Inc. v. United Paperworkers Int'l Union, 768 F.2d 739, 743 (5th Cir. 1985) (award vacated due to public policy against operating dangerous machinery by persons under influence of drugs or alcohol); American Postal Workers Union, AFL-CIO v. United States Postal Serv., 682 F.2d 1280, 1286 (9th Cir. 1982), *cert. denied,* 459 U.S. 1200 (1983) (award vacated which required performance of an illegal act); Local 249, Int'l Bhd. of Teamsters v. Consolidated Freightways, 469 F. Supp. 346, 349 (W.D. Pa. 1979) (award vacated when it required employees to break state motor vehicle safety laws).

67. 736 F.2d 822 (lst Cir. 1984).

68. *See id.* at 823.

69. *Id.* at 826. The Arbitrator ruled that the Postal Service did not have just cause for the discharge of the employee. The Arbitrator found that the employee did not intend to keep the money evidenced by his retention of records of the money orders and also by his seven years of employment without disciplinary problems. The Arbitrator did rule that the Postal Service had just cause for suspending the employee without pay and to transfer him from a window clerk position, where he has access to money orders, to another position that did not involve dealing with money. *Id.* at 823.

70. *Id.* at 825.

ments of public policy, it is even less clear that the court demonstrated an explicit conflict between the reinstatement of the employee and the policy against embezzling government funds. The employee was sanctioned for his infraction and was suspended without pay, which according to the arbitrator, considering all the surrounding circumstances and the collective bargaining agreement, was penalty enough for the infraction.[71] The court, by misapplying the "explicit conflict" standard, altered what should have been a legally binding award. In *Misco* the Supreme Court had stated that "where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect."[72] In *American Postal Workers*, the Court of Appeals for the First Circuit inappropriately substituted its own interpretation of the collective bargaining agreement and the arbitrator's decision by invoking the public policy exception.

In another case concerning the reinstatement of an employee, *Amalgamated Meat Cutters v. Great Western Food Co.*,[73] the Court of Appeals for the Fifth Circuit overturned an arbitrator's award of reinstatement for a truck driver who admitted having a drink within four hours of overturning the truck he was driving. The arbitrator ordered reinstatement without back pay because the employer failed to disprove the employee's assertions that a steering mechanism failure had caused the accident.[74] The court vacated the arbitrator's award on the basis of the public policy of preventing people from drinking and driving.[75] In supporting the public policy the court stated, "In a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over-the-road truck driver caught drinking liquor on duty violates public policy."[76] The court did, however, attempt to support its position by citing case law and a statute that supported the public policy consideration.[77] However, the

71. *Id.* at 823. Implicit in this award was a finding that there was no just cause for discharging the Employee.

72. 108 S. Ct. 364, 371 (1987).

73. 712 F.2d 122 (5th Cir. 1983).

74. *Id.* at 123–24.

75. *Id.* at 125.

76. *Id.* at 124. The court stated, however, that "the public policy of preventing people from drinking and driving is embodied in the case law, the applicable regulations, statutory law, and pure common sense." *Id.* at 125.

77. *Id.* at 125. *See, e.g.*, National Labor Relations Bd. v. Dixie Motor Coach Corp., 128 F.2d 201 (5th Cir. 1942). In *Dixie Motor*, a bus driver employee was discharged for drinking on the job. Despite the employee's claim that he was discharged because of his union activities, the Fifth Circuit Court of Appeals held that the reinstatement of such an employee to his former position would be contrary to the public welfare and the purposes of the National Labor Relations Act.

case law and statute did not necessarily require termination for an infraction and the court failed to make it clear how the arbitrator's award explicitly violated the policy. While it is clear there is a public policy against drinking and driving, it does not necessarily follow that the reinstatement of an employee who admitted having a drink would violate this policy. The court of appeals in this case correctly followed the first part of the analysis by showing a clear and defined public policy. However, it failed to show, as required by *Misco*, how the reinstatement and the public policy came into "explicit conflict."

S.D. Warren Co. v. United Paperworkers International[78] is yet another case where a court invoked the public policy exception to an arbitration award. In that case, the Court of Appeals for the First Circuit vacated an arbitrator's award which reinstated employees who had been discharged for possession of marijuana on company premises.[79] The court vacated the award for two reasons. First, it found that two clauses of the collective bargaining agreement worked together to give the employer complete authority to terminate in this instance.[80] The court's second point was that the award violated a "well-defined public policy against the use of drugs in the workplace."[81] The court supported this conclusion by stating that the sale and use of drugs is a serious offense under both state and federal law and that the nation has devoted itself to the eradication of drug use.[82] The court then concluded, "In particular, the work shop is a place where such usage is abominable not only because of the health hazard it creates, but also because it creates an unsafe atmosphere and is deteriorative of production, the quality of the products, and competition."[83]

Clearly, there is a public policy against drug usage and possession as defined by state and federal laws. However, this policy does not necessarily preclude the reinstatement of an employee found to possess drugs in the workplace absent a specific contractual provision to the contrary. Just as there are varying degrees of punishment for drug offenses, so too may there be varying degrees of discipline for drug use in the workplace. The parties in this case bargained for a contractual interpretation of discipline as interpreted by the arbitra-

78. 815 F.2d 178 (lst Cir. 1987).

79. *Id.* at 180. The arbitrator found that there was not "proper cause" as required by the collective bargaining agreement and thus decided punishment less than discharge was in order. The district court affirmed the award stating it would not construe "cause" as equivalent to "proper cause" and declined to disturb the arbitrator's decision. *Id.* at 181.

80. *Id.* at 184. This issue will not be explored although it raises questions about the courts' role in interpreting collective bargaining agreements.

81. *Id.* at 186.

82. *Id.*

83. *Id.*

tor—an interpretation which may bring into light other considerations such as past performance and "amenability to discipline."[84] In this instance, the arbitrator considered the circumstances presented to her by the two parties and decided, according to her interpretation of the contract, that there was not "proper cause" for discharge.

In contrast to the broad interpretation of the public policy exception to labor arbitration taken by many courts of appeals,[85] a substantial number of courts have attempted to effectuate a more narrow standard of review to determine whether there has been a public policy violation.[86] The concern of these courts has been to construe the exception narrowly based upon the Supreme Court's criteria of giving all possible deference to the arbitrator's judgment. These concerns were well articulated by the Court of Appeals for the Ninth Circuit, which stated, " 'Public policy should not be turned into a facile method of substituting judicial for arbitral judgment.' "[87] The Court of Appeals for the District of Columbia apparently supports the reasoning behind such a statement. In three recent decisions, that court narrowly construed the public policy exception.[88]

In *American Postal Workers Union v. United States Postal Service*, the court of appeals reversed a district court judgment which overturned the reinstatement of an employee who was alleged to have dishonestly handled postal transactions.[89] The arbitrator was authorized to consider all "applicable laws" in his deliberations. The employer, however, refused to comply with the award because there were doubts as to the correctness of the arbitrator's construction and application of the *Miranda* requirements. The court of appeals held that "[w]hen construction of the contract implicitly or directly requires an application of 'external law,' i.e., statutory or decisional law, the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it."[90] The court therefore

84. United Paperworkers Int'l. Union v. Misco, Inc., 108 S. Ct. 364 (1987).

85. *See supra* note 66 and accompanying text.

86. *See, e.g.*, United States Postal Serv. v. National Ass'n. of Letter Carriers, 810 F.2d 1239 (D.C. Cir. 1987); Northwest Airlines, Inc. v. Air Line Pilots Ass'n. Int'l., 808 F.2d 76 (D.C. Cir. 1987); Berles Co., Inc. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986); E.I. DuPont de Nemours and Co. v. Grasselli Employees Ind. Ass'n of East Chicago, 790 F.2d 611 (7th Cir. 1986); American Postal Workers Union v. United States Postal Serv., 789 F.2d 1 (D.C. Cir. 1986); Amalgamated Transit Union AFL-CIO Local Div. 1309 v. Aztec Bus Lines, 654 F.2d 642 (9th Cir. 1981).

87. *Amalgamated Transit Union*, 654 F.2d at 644. (quoting Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 446 (1969)).

88. *See, e.g., Letter Carriers*, 810 F.2d at 1239; *Northwest Airlines*, 808 F.2d at 76; *American Postal Workers*, 789 F.2d at 1.

89. *Northwest Airlines*, 808 F.2d at 2.

90. *Id.* at 6. The court also stated that "the critical point in this case . . . is that it does not matter whether the arbitrator's construction and application of *Miranda* was

reversed the lower court, finding that the district court judge merely substituted his judgement for that of the arbitrator.[91]

In interpreting the requirements of *W.R. Grace*, the appellate court determined that the exception applies only when the public policy emanates from clear statutory or case law, " 'not from general considerations of supposed public interests.' "[92] The court concluded that the public policy consideration did not emanate from statutory or case law and was therefore based only upon general considerations of public policy. Accordingly, the court found that the arbitrator's award was not illegal and there was no "legal proscription against the reinstatement of a person such as the grievant."[93]

In considering the public policy argument, the court declined to take a broader view of the exception and formulate its own public policy, but instead chose to limit itself to considerations emanating from statutes and case law. The court saw this limitation as necessary in order to comply with the Supreme Court's pronouncement in *Enterprise Wheel* and *W.R. Grace* on the importance of judicial deference to arbitral decisions. The court concluded, "For us to embrace the employer's argument here would be to run the risk of allowing an ill-defined 'public policy' exception to swallow the rule in favor of judicial deference to arbitration. We will not endorse any such blatant disregard of the teachings of *Enterprise Wheel* and *W.R. Grace*."[94]

In, *Northwest Airlines, Inc. v. Air Line Pilots Association International*,[95] the District of Columbia Circuit Court of Appeals reconfirmed its

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correct as a 'matter of law.' " *Id. See generally* Heinsz, *supra* note 2, at 256–88 (general discussion on whether and to what extent a labor arbitrator should apply external law when rendering a decision under the terms of a collective bargaining agreement).

> When the interpretation of a labor agreement implicitly or even explicitly involves considerations of external law, it should be done by the arbitrator. It is the arbitrator's decision that the parties have negotiated for and intended when they agreed that their contractual disputes would be resolved by final and binding arbitration rather than economic weapons or court actions. Where a company and a union agree to allow an arbitrator to determine whether a discharge is for just cause and the appropriateness of the remedy, the arbitrator, and not the court should decide the weight to be given to public policy considerations.

Id.

91. *Postal Workers*, 789 F.2d at 2.

92. *Id.* at 8 (emphasis in the original) (footnote omitted). This requirement does not seem to necessarily mean that the award must be against the law, but only that the public policy consideration must be ascertained from statutes or case law. *See generally* United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 367 (1987) (the Court declined to address the issue of whether a court may refuse to overturn an arbitration award only when that award violates a "statute, regulation, or manifestation of positive law, or compels conduct by the employer that would violate such a law").

93. *Postal Workers*, 789 F.2d at 8.

94. *Id.* at 9.

95. 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1751 (1988).

narrow construction of the policy exception and refused to vacate an arbitrator's award reinstating a pilot who had been discharged for violating a twenty-four hour alcohol rule.[96] In contesting the award, Northwest claimed the award was contrary to public policy and should not be enforced. The court recognized the possible safety concerns but found nothing in the law preventing reformed alcoholics from piloting. In fact, the court noted that Northwest itself had a policy permitting this.[97] Of additional importance was the fact that the court found that the panel of arbitrators were empowered by the contract to hear issues related to airline safety. The court stated: "There is nothing in the parties' agreement that even suggests that a disciplinary action related to an alleged breach of a safety rule is excluded from arbitral review."[98] This finding seems to indicate that, in an industry that is highly concerned with public safety, unless safety and other concerns are specifically limited by the contract they are issues that may be considered and ruled upon by the arbitrator.

Most recently, in *United States Postal Service v. National Association of Letter Carriers*[99] the District of Columbia Circuit again refused to broadly interpret the public policy exception. In this case, the court refused to vacate an arbitration award which reinstated an employee, for lack of just cause,[100] who was arrested and pleaded guilty[101] to the charge of unlawful delay of the mail. The court in this case specifically rejected the First Circuit's holding in *American Postal-Workers Union*,[102] which had found the reinstatement of an employee convicted of embezzling contrary to public policy. The District of Columbia Circuit reiterated its view that the *W.R. Grace* public policy exception was "extremely narrow" and refused to set aside the award because "[t]he Postal Service cannot identify any 'legal proscription against the reinstatement of a person such as [the Grievant].' "[103]

96. *Id.* at 78–79. The employee was a pilot with Northwest and had been employed for sixteen years with an unblemished disciplinary record. He successfully completed a comprehensive alcohol treatment program and had not consumed alcohol since. In addition, he was recertified by the FAA. *Id.* at 79.

97. *Id.* at 83.

98. *Id.* at 81 (emphasis in original).

99. 810 F.2d 1239 (D.C. Cir. 1987).

100. *Id.* at 1240. The collective bargaining agreement, Article 16, Section 1 stipulated that "[n]o employee may be disciplined or discharged except for 'just cause.' Any disciplinary action taken by the Postal Service may be challenged in accordance with the agreement's grievance arbitration procedures. The agreement further provides that discipline should be 'corrective' in nature rather than 'punitive.' " *Id.*

101. *Letter Carriers*, 810 F.2d at 1240. The employee, Hyde, was sentenced to eighteen months probation, the principal condition being that he enroll in and successfully complete a rehabilitation program for compulsive gambling. *Id.*

102. 736 F.2d 822 (lst Cir. 1984).

103. *Letter Carriers*, 810 F.2d at 1241.

In contrast to the District of Columbia Circuit, the Court of Appeals for the Eighth Circuit has construed *Enterprise Wheel* and *W.R. Grace* in a broader sense. However, the Eighth Circuit's decisions on this matter seem at times to be in conflict.[104] In *United Electrical, Radio and Machine Workers Local 1139 v. Litton Microwave Cooking Products*,[105] the court claimed to give deference to an arbitrator's award as long as it draws its essence from the collective bargaining agreement.[106] However, the court went on to say, "Judicial deference to arbitration, however, does not grant carte blanche approval to any decision that an arbitrator might make."[107] In this case the arbitrator had granted one additional week of paid vacation to employees who were forced to take their vacation during a shutdown for inventory purposes. The court ruled that the award was punitive[108] and based on a central factual assumption that was unsupported by the record and thus overturned the award.[109] The court stated:

> Although a mere error in the determination of factual issues is not sufficient to disturb an arbitrator's award, if the arbitrator assumes the existence of a fact that is central to the award, and an examination of the record reveals no support whatever for the arbitrator's assumption, an award cannot stand.[110]

In overturning the award the court ignored the fact that the arbitrator had construed two clauses of the collective bargaining agreement together to arrive at his conclusion whereas the court found that one clause controlled.[111] The reasoning behind this ruling tends to support the idea that the court was not granting judicial deference to the

104. *See, e.g.*, Daniel Constr. Co. v. International Union of Operating Eng'rs., Local 513, 738 F.2d 296, 300 (8th Cir. 1984); Riceland Foods, Inc. v. United Bhd. of Carpenters, Local 2381, 737 F.2d 758, 760 (8th Cir. 1984); United Elec. Workers, Local 1139 v. Litton Microwave Cooking Prods., 728 F.2d 970, 972 (8th Cir. 1984); International Bhd. of Elec. Workers, Local No. 53 v. Sho-Me Power Corp., 715 F.2d 1322, 1326 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984); St. Louis Theatrical Co. v. St. Louis Theatrical Bhd. Local 6, 715 F.2d 405, 408 (8th Cir. 1983); Lackawanna Leather Co. v. United Food & Commercial Workers Int'l. Union No. 271, 706 F.2d 228, 231 (8th Cir. 1983)(en banc); Vulcan-Hart Corp. v. Stove & Allied Appliance Workers Int'l Union Local No. 110, 671 F.2d 1182, 1184 (8th Cir. 1982); Carpenter's Dist. Council of Greater St. Louis v. Anderson, 619 F.2d 776, 778 (8th Cir. 1980).

105. 704 F.2d 393 (8th Cir. 1983).

106. *Id.* at 395 (citation omitted).

107. *Id. See also* Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1, 611 F.2d 580, 583 (5th Cir. 1980).

108. The court found that absent willful or wanton conduct, punitive damages should not be awarded. Additionally, the court found that there was no finding that Litton acted willfully or wantonly and that union did not present any such proof. *Litton*, 704 F.2d at 395–397.

109. *Id.* at 396–97.

110. *Id.* (citation omitted).

111. *See id.* at 400–01 (Arnold, J., concurring in part and dissenting in part).

arbitrator's construction of the contract as required by *Enterprise Wheel*.[112]

In *Manhattan Coffee Co. v. International Brotherhood of Teamsters*,[113] the Court of Appeals for the Eighth Circuit reiterated that the arbitrator cannot assume existence of facts central to an award if there is no support in the record.[114] The court did, however, go on to state that "[j]udicial review of an arbitrator's award that draws its essence from the collective bargaining agreement . . . must be enforced even if the court would have reached a contrary result had it considered the matter in the first instance."[115] In this case the court upheld the arbitrator's construction of the agreement. It is clear from a reading of the two cases, however, that the court could impose its interpretation of the contract on the parties merely by asserting that the arbitrator's interpretation of the agreement misconstrued a central fact. Obviously, this type of analysis is contrary to the requirements of *Enterprise Wheel*.[116]

III. *Iowa Electric Light & Power Company v. Local Union 204 of the International Brotherhood of Electrical Workers*

In *Iowa Electric Light & Power Company v. Local Union 204 of the International Brotherhood of Electrical Workers*,[117] the Eighth Circuit Court of Appeals vacated the reinstatement of an employee at a nuclear power plant because, according to the court, it violated public policy.[118] The employee, Schott, worked in the machine shop area of

112. 363 U.S. at 599. The Supreme Court emphasized that collective bargaining agreement interpretation is for the arbitrator: "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.*

113. 743 F.2d 621 (8th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985).

114. *Id.* at 623.

115. *Id.* at 624.

116. 363 U.S. at 596. In Daniel Constr. Co. v. International Union of Operating Eng'rs, Local 513, 738 F.2d 296 (8th Cir. 1984), the Eighth Circuit considered the public policy exception to arbitration. The court was asked to overturn an arbitration award based on the public policy favoring the enforcement of no-strike clauses. The court refused to vacate because the collective bargaining agreement allowed, but did not require the arbitrator to impose damages as a sanction. The court found that the parties left it up to the arbitrator to decide whether damages were appropriate. The court found that there was a public policy favoring the enforcement of no-strike clauses. However, it declined to overrule because "[p]ublic policy does not prescribe any particular sanction for violations of no-strike clauses." *Id.* at 300. The court stated, "Public policy does not empower this court to override the decision of the arbitrator not to impose a particular sanction, where nothing in the contract requires that sanction, and where the parties themselves have asked the arbitrator to determine the appropriateness of the proposed sanction." *Id.*

117. 834 F.2d 1424 (8th Cir. 1987).

118. *See id.* at 1427.

the employer's nuclear power plant. The machine shop is located within the plant's secondary containment area—a buffer zone designed to prevent the spread of any radiation that might escape from the primary containment area at the core of the reactor.[119] Interlock doors are maintained that may only be opened one at a time to maintain the building's pressurization and ensure that any leakage remains inside the plant.[120] When one door is open the other is automatically secured. The only way to defeat this system is to have someone outside the door pull a fuse from the interlock mechanism.[121] Schott was discharged because he purposely defeated the interlock system.

Schott had a broken leg which decreased his mobility and on the day of the incident he attempted to leave the shop early for lunch to avoid the noon crowd, but he found the door in the machine shop locked.[122] Schott then called an engineer in the control room and requested permission to defeat the system so he could open the door, but was refused permission.[123] Schott then told the foreman on the other side to pull the fuse. The foreman complied and Schott opened the door and walked through.

A. Public Policy Favoring Safety

After an investigation of the incident by the company Schott was fired for "violating secondary containment."[124] The discharge was approved in a report by government officials at the Nuclear Regulatory Commission (NRC).[125] Schott and his union then filed a grievance under the collective bargaining agreement. As stipulated by the agreement a hearing was held before an independent arbitrator to determine whether the company had just cause to discharge Schott. The arbitrator ruled that his termination was "too severe" and not justified under the "total circumstances of the case."[126]

The court refused to enforce the award on the basis that it violated the "public policy of this nation concerning strict compliance with

119. *Id.* at 1425.

120. *Id.* at 1425–26.

121. *Id.* at 1426.

122. Apparently the interlock was properly activated because a truck was standing in the railway truck shed doors.

123. *Id.*

124. *Id.* The foreman was also dismissed.

125. *Id.*

126. *Id.* Although the arbitrator founded that Schott's act was "deliberate, improper, foolish and thoughtless" he ordered reinstatement because of his finding that Schott was not aware that "the situation was as grave a matter as that claimed by the company" and that "the various training sessions . . . did not address the door problem . . . specifically. . . ." *Id.*

safety regulations at nuclear facilities."[127] The court decided that this policy was "well defined and dominant"[128] as was evidenced by the fact that the NRC had promulgated volumes of safety rules that govern all nuclear power plants.[129] The court noted in a footnote that it need not "find that the award itself is illegal before we overrule the arbitrator on public policy grounds."[130] The court also noted that the NRC endorsed Schott's termination. Notwithstanding these observations, the court stated:

> Our holding today should not be read as a blanket justification for the discharge of every employee who breaches a public safety regulation at a nuclear power plant. There might be circumstances under which a violation may be excused. But in this case, Schott's violation of the safety rule was serious.[131]

The court's analysis is mistaken in several respects. While there is more than likely a national policy concerned with safety at nuclear power plants[132] it is not at all clear that this policy requires "strict compliance" with all safety regulations. The court admitted that its holding should not be read as justification for the discharge of every employee who breaches a safety rule at a nuclear plant. The discharge was necessary, evidently, simply because the violation was "serious." Consequently, the public policy concern becomes a national policy requiring strict compliance with serious safety regulations at nuclear facilities.

If the national policy requires strict compliance with safety regulations where a violation would be "serious," the question becomes who is to determine whether a violation is serious? Perhaps more importantly, is this is an appropriate question for the courts? Certainly the courts do not have the expertise to determine what violations are serious and which are not. By the court's own admission there is an entire agency to oversee the safety at nuclear power plants.[133] Clearly then, determining which rules are serious and which are not is a job for the NRC. The NCR did not mandate discharge for failure to "strictly comply" with the safety rule which Schott violated, even though the NRC is the source of the "well defined and dominant" public policy that the court invoked.[134]

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127. *Id.*

128. *Id.* at 1427.

129. *Id.* at 1428. Any violation of any rule must be reported to the NRC; the NRC responds by issuing enforcement penalties against the offending facility.

130. *Id.* at 1427 n.3.

131. *Id.* at 1429 (footnotes omitted).

132. *Id.* at 1426.

133. *Id.* at 1428.

134. *Id.* at 1427 (citations omitted).

B. *"Essence of the Contract"*

The court in *Iowa Electric* also vacated the arbitrator's award despite the United States Supreme Court's admonition in *Enterprise Wheel* that a court may not review the merits of an arbitrator's award if the decision drew its "essence" from the collective bargaining agreement.

In *Iowa Electric*, the arbitrator's decision drew its essence from the collective bargaining agreement. The parties agreed to submit the dispute to arbitration and agreed to abide by the arbitrator's decision.[135] To quote the District of Columbia Circuit Court of Appeals, "There is nothing in the parties' agreement that even suggests that a disciplinary action related to an alleged breach of a safety rule is excluded from arbitral review."[136] The arbitrator in *Iowa Electric* was empowered by the collective bargaining agreement to determine whether the disciplinary actions taken against the employee were appropriate.[137] This type of dispute was certainly contemplated by the parties in the formulation of the collective bargaining agreement[138] and it was therefore inappropriate for the court to intervene and substitute its own judgement in the place of the arbitrator's. As the Supreme Court stated in *Warrior Gulf*, "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."[139]

The Supreme Court in *Enterprise Wheel* and again in *Misco* affirmed the fact that an arbitrator is "authorized to disagree with the sanction imposed for employee misconduct."[140] Although the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgement to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*"[141] The parties may limit the discretion of the arbitrator in the formulation of remedies.[142] In *Iowa Electric*, however, the parties declined to do this.

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135. *Id.* at 1426.

136. Northwest Airlines v. Air Line Pilots Ass'n, 808 F.2d 76, 81 (D.C. Cir. 1987) (emphasis added).

137. 834 F.2d at 1426.

138. Similarly, the NRC, as a result of its extensive involvement in the planning, construction, and operation of the power plant, undoubtedly foresaw that if a plant operates under a collective bargaining agreement, arbitration of safety issues is likely to arise. *Id.* at 1428.

139. United Steelworkers of America v. Warrior Gulf & Navigation Co., 367 U.S. 574, 582 (1960).

140. *See* United Paperworkers Int'l. Union v. Misco, Inc., 108 S. Ct. 364 (1987).

141. *Id.* at 372 (emphasis in original) (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

142. *Id.*

The Supreme Court in *Misco* also held that there must be an "explicit conflict" with other "laws and legal precedents."[143] In *Iowa Electric*, where there was no explicit conflict with other laws and legal precedents, the arbitrator did not find that the collective bargaining agreement required the employee to be discharged. The NRC, the agency in charge of insuring safety at nuclear facilities, did not require the employee to be discharged for his infraction.[144] By not requiring automatic discharge for safety violations, the arbitrator clearly felt that not all safety violations required discharge and that there may be certain mitigating circumstances in which discharge is not appropriate. Under the collective bargaining agreement, with knowledge of the NRC safety requirements, these mitigating circumstances were to be determined by the arbitrator, "bringing into consideration the practices of the industry and the shop."[145] In this case, the arbitrator found the employee's termination was "too severe" and not justified under the "total circumstances of the case."[146]

As a result, the arbitrator's mitigation of the employee's discipline did not conflict with explicit public policy as formulated by the NRC, but instead conflicted with the Eighth Circuit's own general policy requiring "strict compliance" with all safety regulations at nuclear facilities.[147]

Not only is the Eighth Circuit Court of Appeals' decision in *Iowa Electric* inconsistent with the United States Supreme Court's criteria, but it is also inconsistent with the Eighth Circuit's own decisions.[148] For example, in *Manhattan Coffee*, the court of appeals held that judicial review of an arbitrator's award is extremely limited and if the award draws it essence from the agreement, "it must be enforced even if the court would have reached a contrary result had it considered the matter in the first instance."[149]

Similarly, in *Daniel Construction Co. v. International Union of Operating Engineers, Local 512*,[150] in refusing to overturn an award based on a "public policy favoring the enforcement of no strike clauses," the court stated: "We decline to set the award aside on that ground. Public policy does not prescribe any particular sanction for violation

143. *Id.* at 373 (citations omitted).

144. Iowa Electric & Power Co. v. Electrical Workers, Local 204, 834 F.2d 1424, 1426 (8th Cir. 1987). The NRC did, however, approve of the discharge. *Id.*

145. Steelworkers v. Warrior Gulf & Navigation Co., 363 U.S. 574 (1960).

146. 834 F.2d at 1426.

147. *Id.*

148. *See, e.g.*, United Elec., Radio and Machine Workers Local 1139 v. Litton Microwave Cooking Prods., 704 F.2d 393 (8th Cir. 1983).

149. Manhattan Coffee Co. v. International Bhd. of Teamsters Local No. 688, 743 F.2d 621 (8th Cir. 1984).

150. 738 F.2d 296 (8th Cir. 1984).

of no-strike clauses."[151] The court further stated that "public policy does not empower this court to override the decision of the arbitrator not to impose a particular sanction, where nothing in the contract requires that sanction, and where the parties themselves have asked the arbitrator to determine the appropriateness of the proposed sanction."[152]

Clearly, these cases evidence a narrow interpretation of the public policy exception to arbitration awards. In following these cases, the court in *Iowa Electric* should not have required a particular sanction, where nothing in the contract required that sanction and the parties had asked for an arbitral determination of punishment.

In *United Electric*, a case where the Court of Appeals for the Eighth Circuit did apply the public policy exception, the award was overturned on the basis that the Arbitrator had made an erroneous assumption of a central fact.[153] The court reasoned that except for this erroneous assumption the result would have been different and that it was therefore justified in overturning the award. However, even if the court's review of the facts in *United Electric* was justifiable, there was no erroneous assumption of central fact in *Iowa Electric*. The arbitrator was aware of the fact of the discharge and was empowered by the parties to determine whether the discipline was appropriate. His determination should not be overturned by the appellate court based on their own formulations of general public policy requiring "strict observance of all safety regulations at nuclear power plants."

CONCLUSION

The Eighth Circuit Court of Appeals failed in *Iowa Electric* to correctly apply the Supreme Court's criteria for vacating arbitration awards. In the *Steelworker's* Trilogy the Supreme Court determined that there was a strong policy in favor of arbitration of labor disputes. The third Trilogy case, *Enterprise Wheel*, stands for the proposition that a court should refuse to review an arbitrator's decision so long as it draws its essence from the collective bargaining agreement. In its most recent cases the Court has narrowed the exception even further. In *W.R. Grace* the Court ruled that a "public policy" must be "well-defined and dominant," and must be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. Finally, the Court ruled in *Misco* that a court's refusal to enforce an arbitrator's award is restricted to situations where the contractual interpretation would create "explicit conflict" with other laws and legal precedents.

151. *Id.* at 300.
152. *Id.*
153. *United Electric*, 704 F.2d at 396.

These rulings show the Eighth Circuits' narrow interpretation of the public policy exception. Although the clearest requirement for allowing the public policy exception to arbitration awards may be to require the award to violate a statute, regulation, or other manifestation of positive law before it may be overturned, the United States Supreme Court has not required this standard. In fact, in *Misco* the Court specifically choose not to address this issue.[154] While the Court may still adopt this standard, for the present the courts of appeals must attempt to apply the standards set forth in the *Steelworkers* Trilogy, *W.R. Grace*, and *Misco*.

It is nevertheless quite clear that the public policy exception must be tailored very narrowly. If courts, as in *Iowa Electric*, are too liberal in applying the exception and allow their own interpretations of the contract to replace that of the arbitrator's the courts face the risk of undermining the "federal policy of settling labor disputes by arbitration," thereby allowing the exception to swallow the rule.

James P. Moran

154. United Paperworkers Int'l Union v. Misco, Inc., 108 S. Ct. 364, 374 n.12 (1987).